SERVED: August 3, 2007

NTSB Order No. EA-5303

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 1st day of August, 2007

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. DEBRA ANN HODGES, Respondent.	)	Docket SE-17843

OPINION AND ORDER

Respondent appeals from the March 14, 2007 oral initial decision of Administrative Law Judge William R. Mullins,[1] which affirmed the Administrator's emergency order revoking her flight instructor certificate and airman certificate with commercial pilot privileges, based on her alleged violation of 14 C.F.R. § 61.59(a)(1) of the Federal Aviation Regulations (FARs). That section, entitled, "Falsification, reproduction, or alteration of

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

applications, certificates, logbooks, reports, or records," provides as follows:

> (a) No person may make or cause to be made:
> (1) Any fraudulent or intentionally false statement on any application for a certificate, rating, authorization, or duplicate thereof, issued under this part.

We deny respondent's appeal and affirm the order of revocation.

Background

On September 22, 2006, the Administrator issued an emergency order of revocation, revoking respondent's airman certificates. Respondent filed a timely notice of appeal, and later waived the application of the Board's emergency procedures, 49 C.F.R. §§ 821.52—821.57. The Administrator then filed her order as the complaint in accordance with the Board's Rules of Practice, 49 C.F.R. § 821.31(a). Respondent filed an answer, admitting, in pertinent part, that a flight standards inspector may renew a flight instructor certificate that *has not expired* if, within the previous 24 months, the instructor has served in a position involving the regular evaluation of pilots; and admitting that a certificate holder may exchange his or her *expired* certificate for a new certificate with the same ratings, but must take and pass a practical examination (check flight). Respondent denied the allegations as to the circumstances that surrounded the alleged false statements, and denied that she made or caused to be made any intentionally false statements on the application or the certificate. Finally, she denied that she violated the FARs by making or causing to be made said intentionally false

statements.

Respondent also raised affirmative defenses, including the stale complaint rule, 49 C.F.R. § 821.33(a),[2] and the assertion that the complaint failed to allege facts upon which the proposed action could be sustained. Her other claims are not pertinent to this appeal.[3] On October 10, 2006, respondent filed a motion to dismiss based on stale complaint. The law judge denied that motion and a later motion to reconsider. At the conclusion of an evidentiary hearing conducted on March 13 and 14, 2007, the law judge issued a decision affirming the Administrator's order.

Facts

Respondent was an operations supervisor for the St. Louis Flight Standards District Office. The emergency revocation order was based on a May 2005 incident in which she allegedly presented an application, FAA Form 8710-1, Airman Certificate and/or Rating, to Aviation Safety Inspector Donald Dunn, who she supervised at the time, and asked him to renew her certified flight instructor certificate (CFI). Tr. at 37.

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[2] Section 821.33, entitled, "Motion to dismiss stale complaint," provides: "Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action ... the respondent may move to dismiss such allegations as stale...."

[3] Other defenses explored below, but not pursued in this appeal, include: that FAA policies for signing and dating documents did not provide adequate guidance; that a written statement given by respondent to an FAA Special Agent was coerced, in violation of the rights against self-incrimination and to be represented by counsel; and that the action in this case is inconsistent with actions in similar cases, and constitutes discrimination based on protected categories of age and gender.

Almost a year later, in June 2006, following his retirement from the FAA, Mr. Dunn contacted FAA enforcement attorney Mark Camacho and told Mr. Camacho about the May 2005 incident. He told Mr. Camacho that he and respondent backdated the forms for the CFI renewal package. See Adm. Reply Br. at 5. Mr. Camacho notified regional counsel, and Enforcement Investigative Reports were eventually produced for both respondent and Mr. Dunn. Id. at 5-7.

At respondent's hearing, Mr. Dunn testified that he agreed to renew respondent's CFI, in response to her request that he do so. He said that, on that day in May 2005, about an hour after instructing respondent to leave the form and paperwork on his desk, he reviewed the form and found it was already filled out, and that respondent's old certificate was attached to the application. Tr. at 37. Mr. Dunn also testified that, as he started typing the new temporary certificate, he noticed the application was dated February 28, 2005, and that the old certificate had expired on February 28, 2005. Tr. at 37-38. Consequently, he went to respondent's office and told her that her certificate was expired. Tr. at 37. Respondent allegedly did not reply,[4] and Mr. Dunn went ahead and completed the renewal, because he felt pressured to complete the forms, as

[4] At the hearing, the Administrator presented the testimony of Mr. Camacho, who testified that when Mr. Dunn called him in June 2006 and told him about this incident, Mr. Dunn said that when he, Mr. Dunn, told respondent that her certificate was expired, respondent told Mr. Dunn that she would "really appreciate it" if Mr. Dunn would help her out. Tr. at 23-24.

respondent was his supervisor. See Tr. at 39. Mr. Dunn typed a temporary certificate, signed it, and put the entire renewal package in respondent's mailbox. Tr. at 39, 41.

On cross-examination, Mr. Dunn said that he did not remember dates involved in this case (see Tr. at 62-64, 66), but that this incident "was after February 28th [2005]" (Tr. at 64). He also testified that there was "not a chance" that respondent brought the documents to him in February 2005, and that he was certain that the certificate was expired when respondent presented it to him. Tr. at 71-72, 89.

Mr. Dunn's airman certificates were also revoked because of the intentionally false statements he made in respondent's CFI renewal package. Tr. at 43-44, 55-56. When asked about the veracity of a letter that Mr. Dunn had written to the NTSB in regard to the appeal[5] of his order of revocation, in which he stated that he was not sure whether respondent's certificate was expired on that day in May 2005, Mr. Dunn admitted that the letter was not truthful in that regard, and that he was "mad" at the time he wrote that letter. Tr. at 67.

At the hearing, the Administrator also presented the testimony of FAA Special Agent Lourie Boyd, who testified that when she interviewed respondent on July 25, 2006 (see Exh. A-5 at 32), respondent "realized that [her CFI] had expired" (Tr. at 127).

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[5] Mr. Dunn initially appealed the revocation of his certificates, but subsequently withdrew his appeal.

Discussion

Respondent's appeal presents a two-pronged argument. First, she argues that the facts the Administrator alleges do not support a finding that she made or contributed to any false statement with regard to the renewal of her CFI. In addition, she argues that the stale complaint rule bars the Administrator's complaint. We address the stale complaint issue first.

Stale Complaint. As noted earlier, the stale complaint rule says that the respondent may move to dismiss the allegations in a complaint regarding offenses that occurred more than 6 months prior to the Administrator's advising the respondent of reasons for proposed action. 49 C.F.R. § 821.33. Two exceptions apply, depending on whether the case: (a) does not allege lack of qualification of the respondent, or (b) does allege lack of qualification. See 49 C.F.R. § 821.33.

As to the first exception, in order to prevail on a motion to dismiss, the Administrator must show "that good cause existed for the delay." § 821.33(a). In order to prevail on the second exception, the complaint must allege lack of qualification to hold a certificate. A lack of qualification is presented if the complaint alleges:

> an offense or offenses that, if true, would support a finding not just that the airman did not exercise the appropriate judgment or perform with competence on some specified date or dates, but that his conduct was so deficient that it raises a significant question as to whether the airman continues to possess the care, judgment, responsibility, knowledge or technical ability required by his certificate.

Administrator v. Bellis, NTSB Order No. EA-4528 at 5-6 (1997).

Accordingly, the "lack of qualification" exception applies to cases in which records have been intentionally falsified. See, e.g., Thunderbird Propellers, Inc. v. FAA, 191 F.3d (10th Cir. 1999) (maintenance records).

Procedurally, in cases "where the complaint alleges lack of qualification ... the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true," and then, if a lack of qualification is presented, "the law judge shall deny the respondent's motion [to dismiss the complaint as stale]." § 821.33(b).

In her appeal, respondent argues "for a limited change in application of the exception" to the stale complaint rule. Resp. Br. at 17. She argues that there are "two distinct applications of the Rule"; that the "first is the case where the alleged falsification goes directly to the regulatory qualifications to hold the particular airman's certificate"; and that the "second is where the alleged falsification is extraneous to the airman's certificate and disqualification is based on the Administrator's conclusion of moral turpitude." Id.

Respondent confuses the rule itself with the two exceptions to the rule. At least initially, falsification is not an issue in the application of the stale complaint rule. The rule simply allows a respondent to move to dismiss allegations in a complaint if the offenses were older than 6 months when the Administrator advised the respondent of the reasons for a proposed action. See

49 C.F.R. § 821.33. The text of the rule itself lays out two exceptions, previously stated. Depending on the allegations, and whether any of the allegations is older than 6 months, one of the two exceptions may apply.

If any allegations are older than 6 months and do not allege lack of qualification of the respondent, then the respondent may move to dismiss any such allegations. In accordance with the first exception, § 821.33(a), the Administrator must then show that good cause existed for the delay in bringing the case. If the Administrator cannot show that good cause existed for the delay, then the law judge will dismiss those allegations that are more than 6 months old.

On the other hand, if the allegations do allege a lack of qualification of the respondent to hold a certificate, and if any of the allegations are more than 6 months old, then, again, the respondent may move to dismiss any such allegations. The law judge, in accordance with the second exception, § 821.33(b), then determines whether an issue of lack of qualification is presented if the allegations are assumed to be true. If the law judge finds that a lack of qualification issue is not presented, then the respondent prevails and the motion to dismiss is granted as to any such allegations. If, on the other hand, the law judge finds that a lack of qualification issue is presented, then the law judge will deny the respondent's motion to dismiss, and the case proceeds.

Respondent contends that we should reconsider application of

the rule in her case. Resp. Br. at 17. She claims that, because she is technically qualified to hold her certificates, and because the Administrator's delay in this case is "excessive" (Tr. at 17, 18-19), respondent should not be deprived of her certificates based simply on the Administrator's "conclusion of moral turpitide" (Tr. at 17), especially not the "revocation of certificates not directly related to the documents allegedly falsified" (Tr. at 18-19, 20).

Respondent's argument is simply off the mark. The lack of qualification exception may involve falsification of documents, but it also may simply involve a lack of qualification having nothing to do with falsification. Lack of qualification may be, for example, a failure to successfully complete a re-examination of skills in a practical test. We have held, as we discussed, that falsification of required documents also constitutes a lack of qualification to hold a certificate (see cases cited herein). That is the case we have here. The Administrator alleged lack of qualification based on a falsification of documents, and the law judge subsequently found that respondent was not qualified to hold a certificate by reason of her having falsified her application and because she also caused another individual to make such a false statement. Language from a recent case is instructive:

> Qualification to hold an airman certificate involves far more than just having the technical competence to operate an aircraft; it involves ... possessing the care, judgment and responsibility to comply with rules and regulations designed to ensure safe operation and safety in air commerce. Few violations

> more directly call into question a pilot's non-technical qualifications than do those involving falsifications, and few falsifications more clearly implicate and threaten air safety than do those involving an airman's entitlement to advanced certificates or additional ratings, citing Administrator v. Coughlan, NTSB Order No. EA-5197 at 4 (2005) (quoting Administrator v. Monaco, 6 NTSB 705, 707 (1988)).

Coughlan v. NTSB, 470 F.3d 1300, 1306 (11th Cir. 2006). See also, Administrator v. Brassington, NTSB Order No. EA-5180 at 6 (2005) ("an airman who falsifies required documents lacks qualifications to hold an airman certificate"). Falsification of required documents has everything to do with qualification to hold any certificate. It does not matter that the falsification was "not directly related to the documents allegedly falsified" (Tr. at 18-19, 20), as respondent asks us to consider. This is a lack of qualification because it involves the "judgment and responsibility to comply with rules and regulations designed to ensure safe operation and safety in air commerce." See Coughlan, 470 F.3d at 1306. In this regard, and in this case, we see no distinction between different types of falsification.

Factual Sufficiency. Turning to the next issue, respondent claims that, in effect, the evidence of record does not support the finding of a violation. First, respondent attempts to impeach Mr. Dunn's credibility by emphasizing inconsistencies in Mr. Dunn's testimony. We note, however, that the law judge determined that Mr. Dunn was, in general, a credible witness. Tr. at 339. The law judge also concluded that the evidence in the record showed that respondent was not credible. Tr. at 339-

341.

We have long held that the Board's law judges are in the best position to evaluate witnesses' credibility. Administrator v. Taylor, NTSB Order No. EA-4509 (1996) ("the law judge sees and hears the witnesses, and he is in the best position to evaluate their credibility"). We have also held that credibility determinations are "within the exclusive province of the law judge," unless the law judge has made the determinations "in an arbitrary or capricious manner." Administrator v. Kocsis, 4 NTSB 461, 465 n.23 (1982); see also, Administrator v. Smith, 5 NTSB 1560, 1563 (1986); Administrator v. Sanders, 4 NTSB 1062 (1983). In this regard, the Board is free to reject testimony that a law judge has accepted when the Board finds that the testimony is inherently incredible or inconsistent with the overwhelming weight of the evidence. Administrator v. Blossom, 7 NTSB 76, 77 (1990) (citing Administrator v. Powell, 4 NTSB 642 (1983), and Administrator v. Klayer, 1 NTSB 982 (1970)). Therefore, where parties challenge a law judge's credibility determinations, the Board will not reverse the determinations unless they are arbitrary, capricious, or clearly erroneous. Smith, supra, at 1563.

Respondent has not established that the law judge's credibility assessments and evaluation of the evidence in the record were arbitrary or capricious. We affirm the law judge's credibility findings, and find that respondent's argument regarding Mr. Dunn's testimony is without merit.

In addition, respondent asserts that the Administrator did not meet her burden of proving a violation of § 61.59(a)(1), because the Administrator did not understand what respondent meant when she used the terms "application" and "temporary certificate." Resp. Br. at 1-2, 10, 14-17. In this regard, respondent argues that, "All of the written or oral statements attributed to [respondent] in the record pertained to the CFI Certificate, not the Application." Resp. Br. at 16. In particular, respondent argues that she prepared the application for the renewal sometime on or before February 28, 2005, and gave it to Mr. Dunn. Respondent asserts that Mr. Dunn neglected to process the application, and did not complete the renewal until after February 28, 2005. Respondent contends that her interview with Special Agent Boyd occurred 15 months after the renewal, and that she spoke of the certificate, which she received after the renewal date, rather than the application for renewal. Resp. Br. at 10.

With regard to alleged violations of § 61.59(a)(1), we have long held that the Administrator must provide proof to support: 1) a false representation; 2) in reference to a material fact; that is 3) made with knowledge of its falsity. Administrator v. Swain, NTSB Order No. EA-5255 at 2 (2006) (quoting Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), and citing Pence v. United States, 316 U.S. 332, 338 (1942)). In the case at hand, the Administrator has submitted respondent's application for renewal, which contains a material falsification consisting of a

false date on the application. Exh. A-3. In addition, the Administrator presented the testimony of Mr. Dunn, as well as other corroborating witnesses, who proved that respondent knowingly made the false representation. Overall, the record indicates that the Administrator has proven the three necessary elements by a preponderance of the evidence.

Respondent has not demonstrated a basis for reversing the law judge's conclusion regarding respondent's violation of § 61.59(a)(1). The law judge, in judging witnesses' credibility and the evidence in the record, concluded that respondent intentionally falsified her application for the renewal of her CFI, and also caused Mr. Dunn to make falsifications. Tr. at 342. The law judge thoroughly reviewed the evidence, and carefully explained the basis for his conclusions and the reasons why he did not believe respondent's explanations of events.

In the case before us, we adopt the findings of the law judge that respondent backdated her application for renewal of her certified flight instructor rating, thereby making an intentionally false statement; and that she also caused another person to make an intentionally false statement.

We rely on airmen to be truthful on documents relating to aviation matters, and especially those airmen upon whom we rely to enforce the regulations. We find that safety in air commerce and transportation requires affirmation of the Administrator's revocation order.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent’s appeal is denied; and

2. The law judge’s decision, affirming the Administrator’s emergency order of revocation of respondent’s airman certificate with commercial pilot privileges and flight instructor certificate, is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.